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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KEVIN MULDOON,

Plaintiff and Appellant,

v.

LINDA ROGERS as Trustee, etc.,

Defendant and Respondent.

G047238

(Super. Ct. No. 30-2011-00501485)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Randall J. Sherman, Judge. Reversed and remanded.

Law Offices of George B. Piggott and George B. Piggott for Plaintiff and Appellant.

Law Offices of Stephen M. Magro and Stephen M. Magro for Defendant and Respondent.

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Plaintiff Kevin Muldoon, the beneficiary of an education trust, filed a petition for instructions seeking to have the court direct defendant Linda Rogers, the cotrustee, to reimburse him for tuition he incurred while attending law school. The court ordered defendant to pay plaintiff the sum of \$100, the only cash available in the trust at the time plaintiff incurred the expenses. Plaintiff appeals, arguing that he is entitled to full reimbursement from the proceeds of a life insurance policy that funded after he completed his education. We agree he is entitled to the full amount of his law school educational tuition and expenses and reverse and remand for the court to direct defendant to reimburse plaintiff the amount he sought in the petition.

FACTS AND PROCEDURAL HISTORY

In 1998 Edward M. Muldoon and Ann C. Muldoon as settlors created The Muldoon Irrevocable Grandchildren's Educational Trust (trust). The trust was funded by a gift of \$160,100, of which \$160,000 was used to purchase a life insurance policy on the lives of both settlors. The payout was \$1.6 million, payable upon the death of the second settlor. Plaintiff was the oldest of the settlors' eight grandchildren from prior marriages who were the trust beneficiaries.

Article One of the trust states the settlors intended "that the trust estate be used to assist those of our grandchildren . . . who show an interest in furthering their education, to defray the cost of the Educational Program in which they enroll . . . in the manner described herein." It more completely expresses the settlors' intent "to assure that each of our grandchildren have an opportunity to enhance their lives through an education that they desire, without the constraint of having to be anxious about how they will pay for tuition. In this small way we hope that they will carry on our legacy and achieve even greater things in their lives."

Section 1.03 of the trust provides that “[d]uring any period in which any one or more of our grandchildren shall be enrolled as a matriculated student in an ‘Educational Program,’ . . . the trustee shall pay over or apply so much of the income and/or principal of this trust for tuition and any other related expenses . . . of such Educational Program for such grandchild or grandchildren, who are so enrolled, on the terms hereof. Notwithstanding the foregoing, no such payments shall be made . . . to or for the benefit of a grandchild of ours who has not commenced . . . study . . . by the date upon which such grandchild attains age twenty-five . . . years.” (Boldface and italics omitted.) Section 2.05(e) provides: “The trust shall be operative with respect to the proceeds of the policy at the death of the insured thereunder”

Both settlors were still alive when plaintiff did his undergraduate work. Edward personally paid those expenses from non-trust assets. When plaintiff enrolled at Chapman University law school in 2003, he asked Edward to pay for that as well. After discussing it with Ann, Edward advised he would not because she objected “the Muldoon family had already gotten enough of their money.” During his tenure at Chapman law school, plaintiff incurred expenses of almost \$155,000, which he paid for with student loans.

The proceeds of the insurance policy were paid into the trust in 2010 upon the death of the second settlor. Thereafter, plaintiff filed a petition for instructions pursuant to Probate Code section 17200¹ directing defendant as a cotrustee to reimburse him from the trust proceeds for his educational expenses. The court awarded plaintiff \$100, which was the liquid sum in the trust at the time plaintiff began law school. It interpreted section 2.05(e) of the trust to mean that plaintiff could “not retroactively obtain reimbursement” of the amounts he incurred during his law school tenure between 2003 and 2006. It further ruled that the language which “states that the [co]trustees

¹ All further statutory references are to this code.

should apply so much of the income and/or principal of the [t]rust for educational expenses of the beneficiaries . . . means the cash on hand in the [t]rust. It does not mean assets like a life insurance policy which would have to be sold in order to generate any cash.”

DISCUSSION

The resolution of this case turns upon the meaning of the trust provision that states, “During any period in which any one or more of our grandchildren shall be enrolled as a matriculated student in an ‘Educational Program,’ . . . the trustee shall pay over or apply so much of the income and/or principal of this trust for tuition and any other related expenses . . . for such grandchild or grandchildren, who are so enrolled”

Plaintiff contends the language means payment is to be made for tuition and expenses incurred for the time he was in school, regardless of the fact he applied only after he had completed his studies and after the trust funded. Defendant maintains the trust language provides payment may be made only at the time a beneficiary is in school, not for expenses previously incurred and, therefore, plaintiff is not entitled to any payment because he did not request payment during his enrollment. This interpretation was rejected by the trial court and defendant has not appealed that decision. The court ruled the language means that, so long as all the other conditions were fulfilled, the trust should pay for plaintiff’s tuition and expenses but only to the extent of the funds held by the trust at the time he was in school. We believe both the court’s and defendant’s interpretations are erroneous for several reasons.

We start with some general principles of trust interpretation. Section 21122 instructs, “The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended

meaning can be ascertained.” “““In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker.” [Citations.]’ [Citation.] ‘Section 21102 provides, “[T]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.”’ [Citations.] ““In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it.” [Citations.]’ [Citation.]” (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 944.)

“Absent a conflict in the relevant extrinsic evidence, this is a question of law which we consider de novo. [Citation.] . . . “[I]n interpreting a document such as a trust, it is proper for the trial court in the first instance and the appellate court on de novo review to consider the circumstances under which the document was made so that the court may be placed in the position of the testator or trustor whose language it is interpreting, in order to determine whether the terms of the document are clear and definite, or ambiguous in some respect.” [Citations.]” (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439-1440.)

Following these rules of construction we turn first to the trust language to determine the settlors’ intent. There is no ambiguity as to the intent, which is to fund the post-high school education of their interested grandchildren so they would not have to worry about tuition and could lead successful lives. There is an ambiguity, however, about the meaning of the provision, “[d]uring any period in which” one of the beneficiaries is “enrolled” in an “‘Educational Program,’ as defined” in the trust, the trustee is to pay for tuition and other expenses.

Looking at this provision, in conjunction with the language expressing the settlors’ intent, we construe the phrase “during any period” to mean the extent of the amount to be paid, i.e., the tuition and expenses incurred when a beneficiary is enrolled. It does not mean, as defendant asserts, that money can be paid only during the actual time

of enrollment. Nothing in the trust limits payments to “*current* educational expenses while the beneficiary is enrolled.” Defendant’s interpretation that the trust bars reimbursement for prior expenses would add a new term to the trust language not necessary for a reasonable construction of the trust. Rather, the language is clear that payment is to be made for expenses incurred during “*any*” period.

Moreover, defendant’s proposed interpretation flies in the face of the rules of construction, which require, first and foremost, that we give effect to the settlors’ intent and favor a construction supporting payment (see Prob. Code, § 21120 [“Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer”]; see *Estate of Goyette* (2004) 123 Cal.App.4th 67, 73 [““Once the testamentary scheme or general intention [of a trust] is discovered, the meaning of particular words and phrases is to be subordinated to this scheme, plan or dominant purpose””].)

The court relied on section 2.05(e), which states that “[t]he trust shall be operative with respect to the proceeds of the policy at the death of the insured thereunder . . .,” interpreting it to mean there could be no retroactive reimbursements. But we construe section 2.05(e) to describe when the money is available to be paid from the policy. If that section limited payments to those incurred only after the insurance proceeds were paid into the trust, it would eliminate at least plaintiff from the benefits of the trust.

At the time the settlors set up the trust in 1998 plaintiff was 19 years old. If he decided to enroll in a postgraduate program it was reasonably foreseeable he would do so within a couple of years thereafter. The trust required he do so before he reached age 25. And he did enroll in 2003 at age 23 or 24. It was also reasonably foreseeable that at that time one or both of the settlors would still be living, which they were, until 2007 and 2010, respectively. Under these conditions, plaintiff’s inclusion as a beneficiary would have been virtually illusory if retroactive reimbursements were barred. He would not

have been eligible for any gift from the trust. That was not the settlors' expressed intent or plaintiff would have been excluded as a beneficiary.

Defendant's interpretation suggests that, because of plaintiff's age, the settlors understood his expenses would not be paid from the trust. But this construction flies in the face of the intent language and the specific naming of plaintiff as a beneficiary. Likewise, although settlors may put conditions on payment of a gift, the trust here does not include the condition defendant suggests. And, as defendant acknowledges, the trustee's discretion as to whether to pay expenses does not extend to denying payment of legitimate tuition and expenses for an educational program that falls within the definition set out in the trust.

Defendant also relies on Edward's refusal to pay for plaintiff's law school expenses personally, arguing this shows he did not want to pay them in any way. We are not persuaded. First, this conversation took place in 2003, long after the trust was created. Thus, it has no relevance to the settlors' intent. Further, if it were relevant, it is just as reasonable, if not more, to interpret this refusal to mean Edward wanted the tuition to be paid through the trust, not by him personally. After all, that is why the trust was set up. In our de novo review, because the extrinsic evidence is not in conflict nor dependent upon credibility, we resolve any conflicting inferences. (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1133, fn. 6; see also *Estate of Powell*, *supra*, 83 Cal.App.4th at pp. 1439-1440.) Also not relevant is the settlors' payment of school expenses of other grandchildren. Moreover, Edward paid for plaintiff's undergraduate expenses.

We are also wholly unconvinced by defendant's related argument that when Edward refused to personally pay the law school expenses, there is no evidence he told plaintiff he should seek payment from the trust. Defendant posits the reasonable inference is that Edward knew the trust would not pay those expenses. That is not at all logical nor is it in any way relevant. And, again, it says nothing about the settlors' intent at the time the trust was created.

In the same vein, defendant interprets plaintiff's failure to request payment before he enrolled in law school as a showing he did not believe he was entitled to payment or his belief there were insufficient funds in the trust. Plaintiff's belief is irrelevant in determining the intent of the settlors and the meaning of the trust language.

Both parties refer to the testimony of the settlors' lawyer who drew up the trust and of plaintiff's uncle, Edward's son. We do not find any of this evidence particularly helpful. It is primarily comprised of the witnesses's understanding or lack of understanding of the settlors' intent. The lawyer made some recommendations to the settlors about paying for expenses after their deaths, but could not "really tell you if that was the purpose or not the purpose" of the trust. But defendant acknowledges she is not claiming that trust proceeds could be used only after the death of the settlors. And the uncle testified his understanding was one of the trust's purposes was to pay expenses during Edward's life. This evidence sheds very little light on the question before us and does not change our interpretation of the trust.

Based on the trust's language and the settlors' intent, plaintiff is entitled to be paid for the tuition and expenses he incurred in law school. Defendant points to nothing in the record showing a dispute over the amount plaintiff claimed. Therefore we must assume it is correct.

DISPOSITION

The order is reversed and the case is remanded for the court to enter a new order instructing the defendant trustee to pay plaintiff the amount he proved at trial that he was owed for his tuition and related expenses for his term at Chapman University School of Law. Plaintiff is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.